SUPREME COURT, U. S.

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No. 1138

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1968

THE BOSSERT MACHINE COMPANY, an Ohio corporation, and JULIUS G. BOSSERT,
Petitioners.

vs.

THE CITY OF CINCINNATI, a municipal corporation under the laws of the State of Ohio,
Respondent.

PETITIONERS' REPLY BRIEF

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Value is the very heart of an appropriation case, even as *guilt* is the heart of a criminal case. *Value* alone is the sole issue, therefore to merely deny the City's allegation of value does not comply with the mandate of § 163.08, which requires the pleader to *set forth* "the facts relied upon in support of such a denial." The only "fact" was the real *value* and that was not available until after the property was appraised at $65,000.

Respondent argues in its brief that:

> "No excuses of any kind at any time was ever offered * * *." (p. 2)
>
> "It is not necessary that he allege a counter-valuation in his answer or deny anything other than the valuation." (p. 2)

> "It would seem that the appellants simply and utterly failed to make any effort of any kind to preserve their rights." (p. 3)
>
> "The valuation of the City could easily have been denied." (p. 3)
>
> "* * * and have given absolutely no reason for failing to act." (p. 8)
>
> "* * * all that had to be done upon being sued, was filing an answer denying the valuation." (p. 8)
>
> "* * * and have offered no explanation as to why they did not do so." (p. 15)

Thus it can be seen that Respondent relies solely upon a misinterpretation of the requirement of § 163.08, even as it has done from the beginning of this litigation. It is submitted that this appears more like "confession and avoidance" rather than answering the real issue as to the constitutionality of the operating effect of §§ 163.08 and 163.09.

As Ohio Court of Appeals Judge Duffy wrote in an unreported case involving these two sections of the Ohio Code:

> "It is 'compensation', and *not some estimate,* which is to be paid in money or secured by a deposit. *'Compensation shall be assessed by a jury and not by the city.'* (Emphasis added).

It is wrong to permit a "failure to act" as a basis for taking property without due process. As Judge McBride held in an identical case to this one and in holding these two Ohio statutes unconstitutional:

> "It is true that certain constitutional rights may be waived; however, such waiver *must be clear and expressed and cannot be built upon a failure to do anything and cannot be imposed by legislative conditions*

which are contrary to the specially expressed constitutional right in eminent domain cases." (Emphasis supplied.) Montgomery County, Ohio 127646, Board v. Tudor.

Respondent cites several cases from other states, none of which are applicable nor even persuasive as to a determination of the issue here. For instance, Michigan saw fit to drop its constitutional provision providng for a jury trial in appropriation cases. The Oklahoma case merely decided that where the owner announced "ready for trial," he could not later complain that his case was tried by the same jury "which had tried several other similar cases". The West Virginia case turned on the point that the condemnor had sought a jury, but later waived it before the condemnee had demanded a jury. The West Virginia Court held under the peculiar law of that state no jury could be required.

This Petition for Certiorari should be granted to allow amplification.

Respectfully submitted,

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